

company can (or will) move its equipment to a higher spot. 44/ For the most part, Complainants have undertaken all corrections (what Entergy refers to as “cherry picking” 45/) that it can without the assistance of either Entergy’s or another party’s construction crews.

B. Complainants Take Safety Seriously and Have Made Many of the Changes Entergy and USS Requested

Further, by singling out Complainant, Entergy does not take into consideration the considerable amount of work Complainants have already undertaken. Complainants are more than willing to carry the burden of their fair share of clean-up responsibilities and have made significant progress making changes to their plant—even where they disagree with Entergy’s and USS’ analysis.

First, Entergy’s claims that Complainants have been delinquent in managing their plant are unequivocally false. The “evidence” Entergy cites to support its claims intentionally distort Complainants’ otherwise perfectly reasonable conduct. For example, Entergy alleges that Comcast specifically directed personnel not to measure or record any violation observed while working on Comcast facilities as a part of the upgrade. 46/ Entergy conveys the impression that Comcast, in the course of construction, intentionally avoided making measurements and identifying hazardous conditions. This is not true.

The truth is that during the design stage of the upgrade process, Comcast sent personnel out into the field to determine what types of equipment, such as

44/ See Harrelson Reply Decl., ¶ 20 ;

45/ Response ¶415, p. 199.

46/ Response, ¶ 51 pp. 32-33.

power supplies and other electronics, it needed to provide enhanced services. 47/ Making measurements and checking clearances was not within the scope of this limited assignment in the field. 48/ This is a far cry from alleging he was instructed to disregard clearance and safety issues. Not every employee that visits the field during an upgrade does so for the same purposes. Some may be tasked with taking measurements and safety inspections while others may be charged with evaluating future service needs. 49/ This division of labor in no way constitutes evidence of negligence or refusal to comply with safety rules.

Entergy further attempts to convey the impression that Complainants are recalcitrant and have refused to make changes to their plant. This also is not true. Complainants have changed many aspects of their plant to comply with Entergy's and USS' requirements. The majority of them are changes that Complainants can make without Entergy's or the telephone companies' involvement such as bonding, anchor replacements and adjustments to drops. 50/ This is not "cherry picking." The truth is that if Complainants had not made these corrections first, surely, Entergy would be complaining that Complainants were being purposefully obstructionist by refusing to address even the smaller, less burdensome changes.

47/ Billingsley Reply Decl. ¶ 19.

48/ *Id.*

49/ *Id.*

50/ *Id.* ¶ 20; Hooks Reply Decl., ¶ 15 ; Gould Reply Decl., ¶ 16; Allen Reply Decl., ¶ 14 . Depending on field conditions, these tasks sometimes require Entergy's involvement. Complainants have attempted to work on all of those that do not involve Entergy.

The remaining unresolved changes either require other attachers' participation, involve significantly higher costs or are in dispute.

One of the cable operators' major complaints is that Entergy does not clearly identify the standards under which it evaluates the poles and, consequently, standards often change from one inspector to another. In other cases, standards vary between Entergy representatives and USS representatives. 51/ Consequently, even if Complainants undertake expensive make-ready and USS clears the pole, there is no guarantee that Complainants will not be cited for a future violation at the same pole by a different inspector. As Entergy mentioned, Complainants do not have a guaranteed rate of return. 52/ Rather, Complainants operate in a competitive-market business environment and must carefully evaluate expensive, resource draining projects. 53/ Under these circumstances, Complainants are reluctant to sink vast amounts of resources into plant remediation where standards are in flux and basic engineering and construction competence of the pole owner is in question. Whereas Complainants are more than willing to make the *reasonable and necessary* changes Entergy requests, they are not going to rush into expensive, potentially imprudent work. Consequently, Complainants are waiting for either

51/ Billingsley Reply Decl., ¶ 23; Hooks Reply Decl., ¶ 16 ; Gould Reply Decl., ¶ 17 ; Allen Reply Decl., ¶ 15 .

52/ Wagoner Declaration, Response Exhibit 18, ¶ 21.

53/ Billingsley Reply Decl., ¶ 24; Hooks Reply Decl., ¶ 17 ; Gould Reply Decl., ¶ 19 ; Allen Reply Decl., ¶ 15 .

Entergy or a third-party to determine what rules apply so that Complainants can manage their plant accordingly. 54/

Although Complainants have made many of the changes USS and Entergy requested, they have little incentive to notify Entergy when they make corrections to their plant. Complainants have come to learn that post-construction inspections are simply license to an endless cycle of billing events. 55/ Equally troubling for Complainants, USS does not provide documentation showing that the pole passed inspection and was cleared of violations. 56/ This puts Complainants in a difficult position. Complainants need this documentation so that they can prove that they are not responsible for subsequent that violations other attachers (including Entergy) create. 57/ This is especially important because, in many areas, Entergy has been building violations on poles shortly after Complainants have expended considerable resources to clear them. 58/

54/ Billingsley Reply Decl., ¶ 24; Hooks Reply Decl., ¶ 17; Gould Reply Decl., ¶ 19 ; Allen Reply Decl., ¶ 15.

55/ Billingsley Reply Decl., ¶ 25; Hooks Reply Decl., ¶ 18; Allen Reply Decl., ¶ 15 . The same principles apply to Complainants' reluctance to challenge USS' determinations on case-by-case basis. Each time Complainants challenge USS' assessment, it turns into a billing event. Complainants consider it to be more cost effective, at times, to comply with what it believes to be erroneous assessments, than to incur the costs of challenging them.

56/ Billingsley Reply Decl., ¶ 25; Gould Reply Decl., ¶ 21; Allen Reply Decl., ¶ 16.

57/ Billingsley Reply Decl., ¶ 25; Gould Reply Decl., ¶ 21; Allen Reply Decl., ¶ 17.

58/ Billingsley Reply Decl., ¶ 27; Gould Reply Decl., ¶ 22.

C. It Is In Complainants' Best Interests To Ensure Delivery of Safe, Reliable Electricity Because They Cannot Deliver Their Services if the Poles Fail

Complainants have no motivation to install facilities unsafely. Regardless of whether the attachments are authorized or unauthorized, Complainants have the same obligation and some interest to maintain and install its attachments safely. 59/ Complainants have absolutely nothing to gain from shoddy or unsafe installations because they also depend on the safety and reliability of the poles to provide their services. 60 If the poles come down, or if Entergy's electric service is interrupted, Complainants cannot deliver its services to their customers. 61/ As the Commission previously recognized, "Any compromise to the integrity of the pole jeopardizes Complainant's installation and service as it does that of Respondent." 62/ It therefore would be illogical for cable operators to ignore its role in ensuring the viability and integrity of the electric plant.

In response to the damage the ice storms of 2000 and 2001 caused, Complainants mobilized their crews to make repairs and restore service to customers. 63/ Entergy's allegations and insinuations that Complainants did not inspect or make repairs are not true. The truth is that Complainants were working just as hard as Entergy to correct ice storm damage. After the ice storms,

59/ See *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 15 FCC Rcd. 11450, (2000) ¶ 12.

60 See *id.*

61/ See *id.*

62/ See *id.*

63/ See News Release, *Entergy System Fully Restored Ahead of Projections*, Jan. 3, 2001, <http://www.entergy-arkansas.com/AR/newsroom/newsDetail.asp?ID=112&RC=Ar&List=Region> (visited June 7, 2005).

Complainants crews went out to restore service and to repair or replace damaged facilities. 64/

Entergy may have had the *impression* that Complainants were not taking action simply because, in most cases and for logistical reasons, Complainants visited poles to make repairs *after* Entergy. In many cases, Complainants did not believe it was safe for its communications workers or contractors to work on or near the poles until after Entergy cleared damaged or unsafe electric facilities. In other cases, Complainants could not make the necessary adjustments to restore communications service until Entergy had restored power service to Complainants' electronics. 65/

For example, following the ice storm, an entire community in WEHCO's area lost service. In order to restore service, WEHCO had to inspect a significant portion of its plant serving that community. To do so, they followed Entergy's crews. Since electricity restoration is a critical element of restoring communications services WEHCO could not be working in advance of Entergy's crews. 66/

Furthermore, Entergy's implication that Complainants' failure to ride-out and inspect every inch of its plant following the storms justifies the inspection and audit is patently unreasonable. 67/ It is neither standard practice nor logistically

64/ Billingsley Reply Decl., ¶ 28; Hooks Reply Decl., ¶ 28; Gould Reply Decl., ¶ 25; Dial Reply Decl., ¶ 5.

65/ Billingsley Reply Decl., ¶ 28; Hooks Reply Decl., ¶28; Gould Reply Decl., ¶ 25; Dial Reply Decl., ¶ 5 .

66/ Declaration of C. Dial, ¶ 5.

67/ See Response, ¶ 7, n. 2, pp. 4-5.

feasible for a cable operator—or an electric utility—to inspect every pole and every drop following severe weather. 68/

Ultimately, wherever danger to life and limb exists, Complainants have every incentive to address the problems—and do in fact make all efforts to render their plant safe. Entergy's allegations to the contrary are simply not true.

D. By Singling Complainants Out, Entergy Fails To Acknowledge and Address Its Own Culpability for the Condition of Its Plant

The timing and circumstances of Entergy's interest in plant clean-up are suspect. By blaming Complainants for plant conditions, Entergy appears to be absolving itself of its own neglect and mismanagement, looking to Complainants' "deep pockets" to pay for it. 69 From its inception, the Entergy/USS audit and inspection program was designed to "utilize utility infrastructure to maximize all revenue opportunities." 70/ Revenue, plant rehabilitation and database development—not safety—are the drivers behind the program.

As discussed above, Entergy is unable to support its accusations of widespread outages and damages to justify the audit and inspections. Neither has Entergy presented any credible evidence to support its claim that Complainants have been delinquent in maintaining their facilities. The truth is that the parties' prior course of dealing has always been—and continues in the field to be—that the

68/ See Billingsley Reply Decl., ¶ 29; Hooks Reply Decl., ¶ 29; Gould Reply Decl., ¶ 26.

69 See Response, ¶ 190, p. 103.

70/ See Agenda, *2nd Joint Wire & Pole Usage Conference* at 5. Dave Inman, Entergy. Mr. Inman will be giving a seminar entitled "Utilize Utility Infrastructure To Maximize All Revenue Opportunities" on July 18 & 19, attached hereto as Exhibit 1.

parties bring any hazardous issues to the other's attention and to address them as soon as possible.⁷¹ A vast disconnect exists between what USS and Entergy's Joint Use staff seek to accomplish through the audit and inspection program and what Entergy's field personnel and construction crews understand to be applicable joint use standards.

1. Entergy's "safety" program discriminates against Complainants

Entergy's knee-jerk reaction to blame Complainants for most of the problems on its poles highlights that money, not safety, is the real motivation. If safety was truly Entergy's top concern, Entergy would have developed a safety and inspection program focused on cooperation and working together toward a common goal. ^{72/} This program would be focused on addressing all attachers'—including Entergy's—safety issues. However, as discussed in Mr. Harrelson's report, Entergy's safety and inspection program is more akin to a game of "gotcha" than anything else.

For example, Entergy claims to have corrected 11,122 violations on distribution circuit in just Little Rock, North Little Rock and Jacksonville and acknowledges that there are more that it has yet to correct.^{73/} If Entergy found 11,122 violations on its own facilities in just these three areas, there is a high probability that thousands of additional violations solely attributable to electric and telephone facilities exist in their service areas where there are no cable facilities.

⁷¹ See Billingsley Reply Decl., ¶ 39; Hooks Reply Decl., ¶ 18; Gould Reply Decl., ¶ 29; Allen Reply Decl., ¶ 18.

^{72/} See Harrelson Reply Decl. ¶ ¶ 25, 26.

^{73/} See Kelly Declaration, Response Exhibit 11, ¶ 12. Entergy has corrected 11,122 violations. Entergy does not disclose how many violations are in the corrections queue.

Following Entergy's own rationale, discovery of this many violations on only a portion of the poles should have triggered a USS audit of all electric and all telephone facilities. 74/ However, Entergy has not performed a full audit of its own or telephone facilities. 75/ The most likely conclusion to draw is that it was Entergy's desire to generate revenue and shift responsibility for plant conditions that prompted the full inspection, not the test audit results as Entergy claims. This is unjust, unreasonable and discriminates against Complainants.

2. It is unjust, and unreasonable for Entergy to disregard the parties prior practices in the field

One of the fundamental breakdowns in the process is Entergy's refusal to acknowledge the diversity of requirements in the field and how field personnel managed joint use in the field. 76/ This is not unusual. The fact of the matter is that Entergy's Arkansas Joint Use personnel and the USS inspectors have different understandings and expectations of how make-ready and code compliance processes are supposed to work. Entergy's zero-tolerance approach to enforcement at this point in the parties' relationship is part of its "gotcha" program designed to maximize revenue.

Entergy's claims, that it has always enforced its joint use standards, lack credibility. 77/ Over the course of the parties' history, Entergy has not been as concerned with guy markers, anchors or 12 inch separations between

74/ Response ¶ 38, p. 24. Entergy claims that the discovery of a high number of "violations" on Complainants' plant during a "test audit" warranted a full audit.

75/ Response ¶ 129, p. 77.

76/ Billingsley Reply Decl., ¶ 39 ; Hooks Reply Decl., ¶ 23; Gould Reply Decl., ¶ 29; Allen Reply Decl., ¶ 18.

77/ See Declaration of Wayne Harrell, ¶15, Response Exhibit 8.

communications conductors as it claims to be now. For the sake of argument, even if we assume that the joint use personnel at headquarters may always have intended for these standards to apply, the fact is that field employees and construction crews do not implement them consistently. 78/

For example, Entergy's Exhibit C to Wayne Harrell's Declaration is a memo from Carma Boyd to Larry Plumlee and Entergy Managers explaining that all personnel must implement standards consistently. Ms. Boyd describes a letter she states she mailed to all cable operators in Arkansas Power & Light's service area:

The letter is the result of your request for us to notify the cable companies of our intent to uniformly and *more stringently* administer the Agreement with special emphasis on the articles mentioned in the letter.

The cable companies have a very effective communication grapevine among themselves. For that reason it is very important to be consistent in all Districts in administering the Agreement. 79/

The implication is clear: Entergy personnel were not applying standards uniformly among cable operators. This memo (that Entergy itself submitted) directly rebuts its claims that its administration of joint use standards was always consistent with the contract.

78/ Billingsley Reply Decl., ¶ 40; Hooks Reply Decl., ¶ 24; Gould Reply Decl., ¶ 30; Allen Reply Decl., ¶ 19.

79/ Harrell Declaration, Attachment C (Response Exh. 8). The letter Mr. Harrell attached as Attachment C advises cable operators that they must obtain prior authorization before making attachments and that Art. II, Sec. 2.4 of the Agreement, dealing with prepayment for engineering and inspection, will be stringently enforced. Mr. Harrell also claims that the letter advises cable operators "that they must comply with the terms and conditions of the pole attachment agreements, including *design standards*." This is not true. Ms. Boyd did not address design standards in this letter.

This is not uncommon. Joint Use personnel or contractors like USS who are removed from field operations and the normal course of day-to-day field practice often have a different view of how field operations should—or are—being conducted.⁸⁰ Although Entergy's Joint Use personnel may have intended for a formal, written authorizations and documentations of all code variances, the fact remains that the Entergy field personnel, with whom Complainants have a long history in the field, often grant oral approvals, waivers and variations. ^{81/}

Throwing USS into the mix exacerbated the problem. As Entergy has explained, USS brings a number of workers in from out of the area. ^{82/} USS personnel, with little-to-no history with the day-to-day relations between Complainants and Entergy, simply do not have the institutional knowledge and/or understanding of how the very important field relationships have worked over the past few decades.

For example, regardless of what Entergy's Joint Use staff may believe, the fact is that Entergy permitted cable operators to attach to Entergy's anchors for years. Even though a strict interpretation of the pole attachment agreement may require Complainants to set their own anchors, the fact remains that Entergy approved, in the field, attachment to these anchors as a regular practice.

Unfortunately, this practice was undocumented, as are many field practices that evolve out of good working relationships. However, that does not change the

⁸⁰ See Harrelson Reply Decl., ¶ 70.

^{81/} Billingsley Reply Decl., ¶ 40; Hooks Reply Decl., ¶ 24; Allen Reply Decl., ¶ 19.

^{82/} Response ¶¶ 582-583, pp. 260-261.

fact that Entergy was well aware of these practices and complicit in perpetuating them. It is wholly unreasonable for Entergy now to claim that they are evidence of wrong doing.

In this same vein, WEHCO categorically denies Entergy's claims that it had no notice of WEHCO's overlash project. WEHCO has historically had a positive working relationship with Entergy personnel with open lines of communication. Although no paper documentation may have changed hands, WEHCO personnel discussed all major projects with Entergy personnel, such as Misty Osbourne and Cindy Thompson. Often this involved telephone calls and meetings in the field. 83/

Prior to beginning its upgrades in Hot Springs, for example, WEHCO specifically notified Entergy that the project was going to commence. During the course of the upgrade, WEHCO offered to provide an updated pole attachment count in real time as the upgrade progressed. Entergy declined this offer and stated that after the upgrade Entergy would conduct an audit. 84/ A couple of years later, the parties worked together to come up with a mutually acceptable attachment count by using WEHCO's maps. Essentially, the parties conducted a paper audit by comparing each others' maps and determining that the exact poles in question matched up on both parties' documentation. 85/

83/ Dial Reply Decl., ¶ 8.

84/ *Id.*, ¶ 9.

85/ *Id.* ¶ 10.

In 1996, Cadron Cable, Alliance's predecessor, conducted an overbuild. Alliance also strongly disputes that Entergy did not know about Alliance's 1996 upgrade. As with WEHCO, Alliance had open lines of communication with Entergy. 86/

With respect to all Complainants, Entergy implies that, since there is lack of documentary evidence or other documentation of formal notification, Complainants did not make notifications. This is an unreasonable assumption. Not only were there verbal notifications, it should have been plain to anyone working in the area—including Entergy—that upgrades were underway—trucks were rolling, news releases were issued. 87/ Most important, Complainants had to install and activate new electronics, such as power supplies. Cable operators cannot activate electric service to their power supplies without Entergy. 88/ More likely than not, Entergy has no documentation because it simply failed to keep a record of Complainants' reported activities.

The fact remains that Complainants are willing to comply with Entergy's reasonable standards on a going forward basis as well as many standards that the Complainants disagree are reasonable. That said, Complainants do not agree to be penalized by the retroactive application of these standards. Complainants are not the scofflaws Entergy accuses them of being. To the contrary, the Complainants have abided by the practices that have evolved over the course of years of working

86/ Hooks Reply Decl., ¶ 20

87/ *Id.* ¶

88/ *Id.* ¶ 25.

together. Imposing permitting freezes and shifting costs of Entergy's plant management as punishment for this conduct is neither fair nor reasonable.

E. Unauthorized attachments

Entergy has absolutely no evidence to support its claims that Complainants have made widespread unauthorized attachments. The truth is that Complainants have attempted to work with Entergy to reconcile attachment counts. In many cases this has been successful: Entergy has been cooperative and the parties were able to reach mutually agreeable attachment counts.

For example, as discussed at pages 31-32, above, WEHCO and Entergy affirmatively worked together to compare maps and settle on an attachment count. As a part of the process, the parties shared information and, as a side benefit, Entergy was able to update its maps to include poles (as opposed to attachments) of which Entergy had no prior record. 89/ WEHCO had no problem helping Entergy as a part of this process. After some back and forth and visits to the field, the parties reached an agreed upon number. In accordance with the parties' agreement, WEHCO paid back rent on attachments that weren't previously captured in Entergy's records. 90/ In WEHCO's experience, Entergy's contractor Michael Bethea was helpful and willing to work with WEHCO to synchronize the parties' records and, above all, to make sure they were accurate. Mr. Bethea's cooperative

89/ Dial Reply Decl., ¶ 10.

90/ *Id.* ¶ 11.

attitude starkly contrasts with the game of “gotcha” WEHCO has experienced since USS arrived. 91/

Although Entergy’s knee-jerk reaction may be that this back and forth is evidence of WEHCO wrong-doing or illegal attachments, the evidence simply does not support this. This is just the result of positive field relations. Furthermore, this method of attachment reconciliation causes Entergy no harm. WEHCO continues to have an obligation and incentive to maintain *all* attachments safely—regardless of when Entergy records them. 92/ Further, WEHCO ultimately paid Entergy for the attachments, including some amount of back rent. In the end, Entergy came out ahead.93/ Entergy was able to update its records to reflect additional poles simply because of the open lines of communication between the parties.

In other cases, however, Entergy has not been cooperative on attachment counts. For example, Comcast has been trying to work with Entergy, without success, to reconcile attachment counts. In early 2004, Comcast found discrepancies between EAI totals and its own. Comcast’s Marc Billingsley and immediately notified USS. USS responded that the supporting document it had sent to Comcast was incorrect and requested that Comcast put the matter on hold until further notice. 94/

91/ *Id.* ¶ 12.

92/ *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 15 FCC Rcd. 11450, ¶ 12 (Cab. Serv. Bur. 2000), *aff’d on reconsideration* 17 FCC Rcd. 6268 (2002), *aff’d sub nom Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

93/ Dial Reply Decl., ¶ 11

94/ Billingsley Reply Decl., ¶ 42; Letter from M. Grimmett to D. Inman, dated August 9, 2004, attached hereto as Exhibit 2.

One of the problems Comcast had with the count was that there was no clear definition of what “attachment” meant. Although Comcast may have more than one piece of equipment on the pole, depending on the placement and method of attachment, it does not necessary constitute an “attachment” for inventory purposes. Consequently, Mr. Billingsley asked for a written definition in April 2004 in a proactive attempt to verify the new EAI count if and when it was to arrive. 95/

In May of 2004 Comcast received a new invoice for attachment counts with a drastically lower number. This invoice neither included a definition of an attachment, supporting documentation to support the numbers counting or a circuit-by-circuit analysis so that Comcast could verify the results. At the parties’ May 26, 2004 meeting, EAI agreed to supply the necessary backup. 96/

However, the next thing Mr. Billingsley received from Entergy on this matter was a letter from Dave Inman demanding payment in full. He did not include any of the promised backup materials. In August, 2004 Comcast renewed its request for back up materials. 97/ Entergy did not provide these materials until October 2004. 98/

Comcast continued to have problems with Entergy’s definition of attachment and the way Entergy counted attachments. Comcast immediately notified Entergy

95/ Billingsley Reply Decl., ¶ 42; Email from M. Billingsley to T. Wagoner, dated Apr. 1, 2004, attached hereto as Exhibit 3.

96/ Billingsley Reply Decl., ¶ 42; Letter from M. Grimmett to D. Inman, dated August 9, 2004, (Exh. 2).

97/ Billingsley Reply Decl., ¶ 42; Letter from M. Grimmett to D. Inman, dated August 9, 2004, (Exh. 2).

98/ Billingsley Reply Decl., ¶ 42.

of its concerns. USS responded in November, 2004 stating that they were discussing the issues with Entergy. However, Comcast has received no communication from either party on this issue since. 99/

It is absolutely incorrect for Entergy to allege that Comcast is not working with Entergy to deal with attachments count issue. 100/ Furthermore, Comcast has never taken the position that it will not pay for its attachments. 101/ Comcast will pay for its attachments, but first, the parties need to work out their differences over the count.102/ As can be seen from the WEHCO example, this can be accomplished. However, unless Entergy is willing to sit down and work with Comcast, no progress can be made.

Entergy's automatic assumption that Complainants are to blame for unrecorded attachments is unreasonable. Entergy has presented no evidence of how it keeps attachment counts, or how its own employees report new numbers, or whether there is a process for adding attachments to the count when permits are granted. The fact is that in many areas, it is common for utilities to update attachment records periodically instead of keeping track of each individual attachment at the time it is made. Ultimately, any number of reasons exist as to why attachment counts may have increased as a result of the audit and inspection, including historical practices of the parties, changing definitions of what constitutes

99/ Billingsley Reply Decl., ¶ 42.

100/ Billingsley Reply Decl., ¶ 45.

101/ Billingsley Reply Decl., ¶ 41; In fact, Comcast paid a significant amount of the total, in good faith, while the parties worked to come to an agreed amount. See Letter from M. Grimmett to D. Inman, dated August 9, 2004, (Exh. 2).

102/ Billingsley Reply Decl., ¶ 41.

a “billable attachment,” and Entergy’s poor recordkeeping. This is especially true in Arkansas, where pole attachments were managed through informal field relationships and fragmented contract administration. 103/

IV. **TRUTH NO. 3: COMPLAINANTS ARE NOT PRESUMED TO BE RESPONSIBLE FOR ALL VIOLATIONS BECAUSE ENTERGY’S FACILITIES WERE PLACED ON THE POLES FIRST.**

Entergy cannot absolve itself of responsibility for violations on the poles by hiding behind its False Premise No. 3. Entergy’s claim that cable television facilities are almost always the last facilities placed on a pole is completely wrong. The facts of this case as well as common sense clearly point to the opposite conclusion. Although cable operators historically have built out their networks after *initial* electric and telephone deployment, it is nonsense to argue that electric was always there first, let alone to design and implement an audit program on such a premise.

Both electric and communications companies built their aerial plant today in much the same way that they built them in the 1960s. First, the pole owner installed the poles. Next the electric utilities install their lines on the top portions of the poles. Historically, telephone companies installed their facilities in the “communications space” which begins immediately below the “communications

103/ See e.g., Harrell Declaration, Attachment C. The memo from Carma Boyd to Entergy manages shows that Entergy had not been enforcing its pole attachment requirements uniformly.

worker safety zone" ("CWSZ"). Cable television attachments usually were the third set of attachments to be placed on the pole. 104/

EAI concludes that, because of this construction sequence, cable operators are responsible for violations. 105/ This analysis is overly simplistic and creates a false picture of plant conditions. The fact is that electric utility networks are not static. Utilities, including Entergy, continue to install new equipment to keep up with development and growth. Utilities install transformers only at the time that they are needed to supply power to a dwelling, business or other structure. 106/ Although poles and electric distribution and/or transmission wires may exist in advance of specific service need, a utility does not install a transformers or other equipment until the electric service needs of the immediate area require it. 107/

Thus, if electric service is not needed at a particular location, generally no transformer exists. In these cases, cable television operators can install their facilities easily without creating any clearance issues. This is often the case in sparsely populated areas where transformers are placed relatively infrequently. Entergy installed many of its poles 20 to 40 years ago in these types of areas: along roads with little initial development. Thousands of examples of these clean poles can still be seen, especially in outlying areas. They contain almost no clearance

104/ Harrelson Reply Decl. ¶ 26.

105/ Response ¶¶ 12, 93-94, p. 7, 56-57.

106/ New traffic signals are also installed when new roads are built and vehicle traffic increases.

107/ Harrelson Reply Decl., ¶ 30.

violations because neither power, telephone, nor CATV installed service drops or other facilities. 108/

However, over time, as areas develop and homes and business replace open fields and unpopulated areas, the demand for electric service increases. As a result, Entergy had to install more transformers and services drops on the poles to accommodate the growing need for electricity. In these circumstances (of which there are many in Arkansas) Entergy installs the transformers, drops and street lights *after* cable operators have already installed their facilities. In many cases, electric utilities, such as Entergy, install these new facilities improperly and create violations with respect to cable and telephone facilities, ground clearances and others. 109/ In fact, Mr. Harrelson believes that Entergy's installation of these electric facilities are a major source of NESC violations. 110/

For example, in a number of instances that Entergy has built violations on poles *after* Cox has paid to replace a pole.. 111/ In some cases, Entergy installed transformers on poles only three months after Cox made the corrections USS required. 112/ Often Entergy creates these violations without notifying Cox. 113/ Cox has observed that these are not isolated instances, but continuing practices. 114/

108/ Harrelson Reply Decl., ¶ 31.

109/ *Id.* ¶ 32

110/ *Id.*

111/ Harrelson Reply Decl., Figure 47 A; Gould Reply Decl., ¶ 22.

112/ *Id.*

113/ *Id.*

114/ *Id.*

Alliance has suffered similarly. For example, Entergy has added thousands of street lights and new transformers since the initial cable build outs in the 1970s and 1980s to serve new developments. Entergy installed many of these street lights without regard for clearances. As a result, these street lights created violations with respect to cable facilities, causing the pole to be out of compliance with the Code and/or Entergy's joint use standards.

Comcast has documented several instances where Entergy installed new facilities, creating violations and potentially hazardous conditions. Exhibit 5 consists of copies of letters Comcast's contractor UCI has written to Entergy, identifying these violations.

The fact is that Entergy—and not Complainants—is putting in new facilities and creating violations without notifying other attachers, not the other way around. Entergy has not adhered strictly (or otherwise) to its joint use and construction standards in making these installations. Worse, Entergy now blames Complainants for these conditions that it is aggravating and perpetuating itself.

In addition, in Magnolia and Malvern, Entergy and USS have cited Cox for failing to install guy markers. 115/ In the course of attempting to comply with USS' and Entergy's requirements, Cox has placed nearly all of the guy markers USS and Entergy required. 116/ Cox has observed, however, that on many of those same poles, Entergy has unmarked guys. 117/ Although Entergy has insisted that

115/ Gould Reply Decl., ¶ 24.

116/ Gould Reply Decl., ¶ 24.

117/ *Id.*

unmarked guys present safety hazards to the public, 118/ and has had notice that these conditions exist, it has not placed markers. 119/ It is unreasonable for Entergy to claim that Complainants' plant is in "deplorable" 120/ condition or is creating safety hazards when Entergy itself has been reluctant to rectify these same conditions that exist on its own plant which, as electric power facilities, are inherently more dangerous.

V. **TRUTH NO. 4: ENTERGY'S REQUIREMENTS ARE UNREASONABLE, INCONSISTENT AND DISCRIMINATORY**

Entergy's positions on the standards and their application is designed to maximize revenue, and shift responsibility for its own neglect. "Safety" is merely the wrap covering this false package. Relying on False Premise Number Four—that its standards are reasonable and consistently applied, Entergy assumes it is free to impose any terms it wishes as long as the word safety is somewhere nearby. This is incorrect. Federal law requires Entergy's standards to be just, reasonable and non-discriminatory, regardless of how they are styled. 121/

Entergy's development and application of its own standards (and its misunderstanding and misapplication of the NESC) are problematic for several

118/ See Response ¶ 107, p. 64.

119/ Gould Reply Decl., ¶ 24.

120/ See Response ¶ 132, p. 78.

121/ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order*, 11 FCC Rcd. 15499, ¶ 1123 (1996) (hereinafter "*Local Competition Order*") (Section 224(f) "seeks to ensure that no party can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields.")

reasons. First, and most important, Entergy's application of the code is geared toward catching and punishing wrongdoing, rather than find safe and efficient ways of accommodating use. Second, Entergy misapplies critical elements of the Code. Third, Entergy does not have a set of clear of standards from which Complainants can work. Entergy brought USS in as an outsider without an understanding of the parties' historic relationships and field practices. Entergy fails to acknowledge that, in the past, Entergy personnel have been flexible and reasonable, making judgment calls in the field (as is standard in the industry and approving acceptable configurations, albeit one that may not be in strict compliance with code, but non-standard conditions). Fourth, Entergy enforces a stricter set of standards against Complainants than others.

A. Entergy's Application of the Code is Focused on a Game of "Gotcha" and Not Safety

As mentioned above, Complainants believe that it is important to make changes to their plant where there is a threat to the safety of the public and the reliability of the pole plant. For example, they freely acknowledge that certain low cables, certain missing guy wires and certain close separations between power and cable TV create reliability risks and/or hazards to utility workers or the public. These are the kinds of items that, contrary to Entergy's allegations, Complainants are working hard to correct. 122/

122/ Billingsley Reply Decl., ¶ 17; Hooks Reply Decl., ¶ 14; Gould Reply Decl., ¶ 15; Allen Reply Decl., ¶ 13.

However, also as explained above, Complainants cannot undertake this kind of a project without the full assistance and cooperation of the pole owner and other attachers. 123/ Complainants have not received this support. For example, Comcast requested EAI to provide a prioritized list of violations, but Entergy refused. 124/ Although Entergy initially indicated that it would provide such a list, it eventually told Comcast that, since Comcast had a list of violations cited, Comcast could sort through the list manually on its own to establish the necessary priorities. 125/ This lack of cooperation is another indication that Entergy is more interested in playing a game of “gotcha” than in working together to achieve maximum safety.

If safety truly were Entergy’s number one priority, Complainants would expect Entergy to jump at the chance to work *with* Comcast to identify those types of conditions with which Entergy was most concerned so that Comcast could address those first. Whereas Comcast is committed to remedying hazardous, life-threatening conditions immediately, the practical realities of field work dictate that Comcast cannot address every one of the plant conditions that USS has identified immediately. 126/ All parties, including Entergy, must prioritize work. For example, Entergy has been on notice of many of its violations since 2001. However, by its own admission, an undisclosed additional number remain uncorrected. 127/

123/ See notes 43, 44.

124/ Billingsley Reply Decl., ¶ 21.

125/ *Id.*

126/ Billingsley Reply Decl., ¶ 22.

127/ See Kelly Declaration, Response Exhibit 11, ¶ 12.

There is no fault in requesting prioritization. It simply reflects the reality of field work. In addition, Complainants cannot undertake the type of clean-up project Entergy envisions without Entergy's commitment to setting realistic standards. One of the major impediments to informal resolution has been Entergy's refusal to accept compliance with certain NESC rules as a solution to Entergy's safety issues.

For example, after well over a year of impasse between Entergy and Alliance and Comcast, in approximately February 2004, Comcast requested a meeting with senior Entergy officials in an effort to resolve this dispute. On May 26, 2004, the parties met and appeared to make progress in establishing a dialogue. As a result of that meeting, the parties formed a "committee" to establish engineering and construction terms that the parties would use to make the necessary plant corrections going forward. 128/ The main outcome of the meeting was that the parties had a good start on setting a foundation on reasonable engineering standards.

On June 30, 2004, the Committee finally met. At the outset, Entergy distributed "minutes" of May 26, 2004. The following passage, in bold print, was at the top:

Any exceptions to contractual requirements agreed to at this meeting, or future committee meetings will only apply to pre-existing conditions that meet all NESC requirements. All new installations and attachments must meet all conditions and requirements of the contract. 129/

128/ Harrelson Reply Decl. ¶ 38; Billingsley Reply Decl., ¶ 32; Hooks Reply Decl., ¶ 19.

129/ See Harrelson Reply Decl., ¶ 39.